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*Advising Internationals:  
Perspectives on an Enigmatic Profession*

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*Enigmatic* -- Ambiguous, obscure, perplexing. (Oxford English Dictionary);

-- Difficult to explain or understand. (Roget's II, The New Thesaurus)

In a radio broadcast in 1939, Sir Winston Churchill uttered these, now famous words, "I cannot forecast to you the action of Russia. It is a riddle wrapped in a mystery inside an enigma." Churchill had it right -- and not just about Russia. Understanding other countries, cultures and legal systems is not easy; helping them understand ours is sometimes even tougher. Having overseen and worked closely with an on-campus international services office for the last eight years, having observed and participated in the advising of foreign-born students and scholars, and having been an English major, an English teacher and a frequent fanatic for finding the "right" word, I offer some overviews of and insights into the truly *enigmatic* profession of international advising.

With the OED's definition as a guiding star, this paper will explore some of the *ambiguous, obscure, and perplexing* dimensions of advising internationals in today's challenging and legally-charged environment.

## Ambiguous and Conflicting Roles of the International Advisor

International advisers face significant challenges in this post 9/11 environment that immigration practitioners often refer to as “the culture of no.” It is impossible to synthesize all aspects of international advising<sup>1</sup> here -- even the 1,000 + page Adviser’s Manual (an annually-updated publication of NAFSA, Association of International Educators) doesn’t presume to do that. There are, however, two basic dimensions to international advising that, if understood, will help campus counsel and other administrators appreciate the significant responsibilities and challenges facing advisers: 1) their relationship to the federal government and 2) their relationship to individual advisees.

The relationship with the government also has two distinct dimensions: delegated authority *from* the government, and reporting of information *to* the government.

### *Relationship to the Federal Government -- Delegated Authority*

This relationship begins with the institution filing a formal request with the Department of Homeland Security (DHS) for “blanket authorization” to issue the documents upon which consular and immigration officers will rely to identify an individual admitted to study at that institution. In exchange for the privilege of this blanket authorization, the institution confirms: its bona fide standing as an institution; its financial viability; its agreement to meet all the regulatory requirements of the program

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<sup>1</sup> There are essentially three overall categories of international advisers for inbound internationals – 1) those who have been officially selected by their institutions as Designated School Officials (DSOs) for the F-1 (educational) and M-1 (vocational) student visa programs; 2) those who have been officially selected by their institutions as Responsible Officers (ROs) and Alternate Responsible Officers (AROs) for J-1 exchange visitor visa programs; and 3) everyone else, including those who assist applicants for other nonimmigrant (work) visa statuses (e.g., H-1B, O-1 R-1, TN) that do not have specific programs with authorized representatives. While the issues and concerns addressed in this paper apply to all advisers generally, to simplify the discussion, avoid acronym overload and reduce confusion, especially with the J-1 program which has its own governmental agency, body of regulations and terminology, this paper will focus exclusively on F-1 program advisers, referred throughout as “advisers” or “DSOs.”

authorization; and its assurance that it will employ an adequate number of properly trained staff to oversee and administer the program.

Both the institution and the DSO have five identified responsibilities in the F-1 process. The institution's responsibilities include: 1) petitioning for government approval to enroll F-1 students (and re-certifying every two years); 2) designating up to 10 regularly employed members of the school administration to be DSOs, including one Principal DSO (PDSO) to function as the principal contact between the government and the school; 3) accepting prospective students for enrollment in a "full course of study" that leads to the attainment of a "specific educational or professional objective;" 4) providing this "full course of study" to the student; and 5) complying with recordkeeping and reporting obligations. The DSO's responsibilities include: 1) being designated by the school to represent and speak for the school in F-1 student matters; 2) ensuring institutional and individual compliance with the law, by learning and interpreting and applying laws and government policies pertaining to F-1 students; 3) issuing and signing forms I-20, updates SEVIS<sup>2</sup> and assisting in other immigration matters dealing with F-1 students; 4) ensuring that the institution keeps records that are required to be kept and that the institution complies with its reporting duties under SEVIS; and 5) approving or recommending benefits for F-1 students and their families, and educating students and the school about their rights and obligations under F regulations.

According to 8 C.F.R. 214.3(1)(1), eligibility to be a DSO requires that a person:

- Be a regularly employed member of the school administration;
- Have an office located at the school;
- Not be compensated through commissions for recruitment of foreign students;
- Not be an individual whose principal obligation to the school is to recruit foreign students for compensation; and
- Be a U.S. Citizen or a U.S. Lawful Permanent Resident.

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<sup>2</sup>The Student and Exchange Visitor Information System, a government-sponsored, internet-based monitoring system administered by the Immigration and Customs Enforcement (ICE) division of DHS.

Beyond the points listed above, which must be certified by the institution's chief officer, the only other requirement to become a DSO (besides being able to write your own name) is to assert that you have read and are familiar with the five subsections of the Code of Federal Regulations (8 C.F.R. 214.1, 214.2(f), 248, 214.3, and 214.4) that pertain to F-1 student programs – 25 pages in all. This assertion must be made when the DSO initially signs on to the SEVIS system by clicking on "I agree" on the Compliance Agreement Screen. No other certification standards or specified training is required. DSO standards, training and working conditions are essentially unregulated.

*Relationship to the Federal Government -- Reporting Information*

As the quid pro quo for delegated "blanket authorization," approved institutions and their DSOs are required to maintain certain records, to respond to government requests for those records, and to regularly report certain information about their F-1 students to the government. Institutions must keep the following information on each F-1 student (either in the ISO files or in general student information systems):

- i. Name;
- ii. Date and place of birth;
- iii. Country of citizenship;
- iv. Current address where the student and his or her dependents physically reside;
- v. The student's current academic status;
- vi. Date of commencement of studies;
- vii. Degree program and field of study;
- viii. Whether the student has been certified for practical training, and the beginning and ends dates of certification;
- ix. Termination date and reason, if known;
- x. Documents relating to the student's admission to the school (transcripts and application) and financial support documentation;
- xi. The number of credits completed each semester; and
- xii. A photocopy of the student's I-20.

And the following documentation related to the admission of the student, issuance of the I-20 form and maintenance of status:

- i. Written application to the school;
- ii. Transcripts or other records of courses taken, and other supporting documents as part of the admissions application;
- iii. Documentation that the appropriate admissions officer accepted the student for enrollment in a full course of study;
- iv. Documents used by the student to show financial support;
- v. Photocopy of the student's I-20; and
- vi. Medical documentation from a licensed medical doctor or other practitioner that was used by a student to substantiate an illness or medical condition for which a "medical condition" reduced course load was authorized.

DHS may request (upon written notice if requested by the institution) any of the listed information for an individual student or a class of students and the institution has three and ten days respectively to respond to those requests, except when a student is being held in custody in which case the school must respond orally on the same day the request was made, with written notice provided after the fact if the school desires it.

For many years the F-1 regulations have required institutions to keep this same information. Post-9/11 legislation and regulations did not add any additional record-keeping requirements but rather underscored the existing rules ("this time we mean it"). Much of this information is now available to the government through SEVIS, however, institutions should be aware that all of these records must still be kept and available for inspection. In addition, many institutions still receive regular requests from the FBI and other law enforcement agencies for international student information. DSOs should be familiar with FERPA rules and exceptions, which definitely apply, with some special considerations, to international students -- see NAFSA Practice Advisory "Release of international student information to Government officials" (11/21/01) and Laura Khatcheressian's "FERPA and the Immigration and Naturalization Service: A Guide for University Counsel on Federal Rules for Collecting, Maintaining and Releasing

Information About Foreign Students” in The Journal of College and University Law (Volume 29, No. 2, 2003).

The government also requires regular reporting of information on all current and incoming students, scholars and their dependents into the SEVIS system. There are basically two kinds of reporting under SEVIS – event-based reporting on individual students and periodic reporting on all students. Event-based reporting means schools must update SEVIS within 21 days of any of the following events:

- Material change to the name, address or curriculum of the school;
- Any student who has failed to maintain status or complete his or her program;
- A change of the student or dependent’s legal name;
- A change of the student or dependent’s U.S. address;
- Any disciplinary action taken by the school against the student as a result of the student being convicted of a crime; and
- “Any other notification request made by SEVIS with respect to the current status of the student.”

There are also a number of *de facto* reporting events associated with requests for immigration benefits which can only be obtained by updating a student’s SEVIS record including extension of stay, transfer, employment, practical training, reduced course loads, changing level of study, adding dependents, etc. The institution/DSO must also report the following information on all continuing F-1 students no later than 30 days after the deadline for registering classes each term or session:

- Whether the student has enrolled at the school, dropped below a full course of study without prior authorization by the DSO, or failed to enroll;
- The current address of each enrolled student; and
- The start date of the student’s next session, term, semester, trimester or quarter.

Probably the most troublesome and complicated reporting issue for DSOs stems from the requirement to report “any student who has failed to maintain status.” The questions raised not only include how and when a DSO “knows” that status has been violated, but an even more fundamental question of whether a DSO should even be allowed to make this quasi-judicial determination that can arguably only be made by the

government. Being found “out of status” is normally an official agency determination, especially for a foreign national with “D/S” (duration of status) on their I-94 card (arrival/departure record). Virtually all students or scholars on F, J or M non-immigrant visas are in “duration of status” as opposed to having a fixed end date for their stay, like a B visa holder (visitor for business or pleasure). The combination of the uncertainty surrounding most potential status violations and the serious and potentially permanent penalties that attach were a foreign national determined a “visa overstay” or “unlawfully present” creates incredibly difficult advising situations. Whenever possible, advisers should consult with institutional legal counsel and perhaps even independent immigration counsel for the student before taking action, assuming that can be done within the 21-day SEVIS deadline for event-based reporting. Even when confronted with compelling evidence that a status violation has occurred, most advisers will search to find a legal justification to avoid having to report the status violation. Federal regulations have been disappointingly silent on this issue, despite several specific requests for clarification on this issue during the official comment period of the agency rule-making process for the SEVIS regulations.

### *Relationship with Advisees*

These regulatory gaps and other recent developments have tested, reinforced and in some cases strained the adviser/student relationship, creating confusion as to what that relationship really is. Besides “DSO” the adviser role has historically also been called “counselor,” “student advocate,” “coach,” “helper,” “educator,” and “program coordinator.” SEVIS and the other post 9/11 regulations have arguably added “reporter,” “informant,” “monitor,” and “government watchdog” to the list. These new roles have not only changed the adviser’s responsibilities and daily duties, but created a difficult dynamic for many in the field, stressing individuals and offices and straining perceived loyalties to the point of driving some to leave the field. Others have voiced concern for the potential “chilling effect” when students find out that the international office will be reporting on them to the government, diminishing the trust necessary in a counseling relationship and discouraging full candor about cultural adjustment, personal or academic issues. An adviser should definitely disclose the reporting obligations to the student,

especially in advising situations where reporting is likely; this disclosure, however, can be done in such a way as to assure students that the adviser's first loyalty is to the university, not the government and that their primary role is to provide service to the students and help them out of difficulties, notwithstanding legal obligations that must be met. Clearly explaining what information must be reported and when will also help alleviate many potential conflicts and ethical dilemmas.

DSOs regularly face conflicting responsibilities and must make subjective judgment calls on a daily basis about not only what and when to report to the government but how to advise the student of potential trouble. For example, a student who makes statements or takes actions that confirm his or her intent to seek permanent residency is clearly at odds with "non-immigrant intent," a condition of F-1 status. While probably not a reportable status violation under SEVIS, the student should be advised either to reconsider this intention or at least not announce it anywhere near a US consulate or port of entry. When issues like this come up, the student needs to be advised carefully about the legal parameters of what they should and shouldn't say – sometimes a delicate balance between advising and "coaching."

Another example arises from the new requirement that a student reducing his or her course load for medical reasons must obtain DSO permission *before* dropping a class. If the student has dropped the class even one day before seeing the DSO, regardless of the reason (be it an honest misunderstanding or a compelling medical situation), the adviser is faced with the dilemma of either reporting the incident as a technical status violation or ignoring it as a harmless error, under the "no harm, no foul" justification, which many advisers have traditionally used, at least before SEVIS.

How an adviser reacts to situations like these may depend on how they ultimately define their position – which label best fits their role and which should predominate when interests collide. The NAFSA Adviser's Manual defines the adviser's role as "educator, counselor, and helper of foreign students" while acknowledging the need to "carefully balance their duties to their institutions, to the government, to their profession, and to the students they advise." (2005 Adviser's Manual 3-196). To truly "balance their duties" advisers need carefully consider, test, weigh, and ultimately prioritize these roles.

There are potential problems with some of the roles, especially “counselor” and “student advocate” if they are pursued too zealously and to the exclusion of other interests and concerns. “Counselor” can cause trouble if advisers (many of whom come from counseling backgrounds) allow what they might perceive as a need for absolute confidentiality to interfere with their regulatory duties to report certain information. While many advisers rightly see themselves as “student advocates” providing an empathetic buffer between the student and governmental, institutional and societal forces, this role can also be carried to inappropriate extremes if not tempered with other guiding principles, such as institutional loyalty. The job title of “advocate” more properly belongs to legal counsel in a representative relationship with a client. Advisers should also be wary of this label since some of their advising, depending on the specific rules in their jurisdiction, might arguably constitute the “unauthorized practice of law.”

Recently several states have passed “Immigration Consultant” or “Notario” laws to curb the widespread problem of the fraudulent provision of legal advice and representation by those who do not have the state-sanctioned authority to do so. While DSOs and other institutional agents are often explicitly or implicitly exempted from these new laws and other state regulatory efforts, DSOs should carefully review their state’s ethics or court rules governing the practice of law with institutional legal counsel. For a comprehensive analysis of recent “notario” laws, see Andrew F. Moore’s “Fraud, the Unauthorized Practice of Law and Unmet Needs: A Look at State Laws Regulating Immigration Assistants” 19 Georgetown Immigration Law Journal 1 (2004).

While NAFSA prefers “educator, counselor and helper,” the most fitting functional title may simply be “adviser” which puts appropriate emphasis on their role as a communicator, one who gives advice, as opposed to the advisee who receives it. It is important for DSOs to set boundaries and identify when lines need to be drawn and when they are getting close to being crossed, not unlike legal counsel, who, in advising an institutional decision-maker must often delineate where that counselor’s advisory role ends and where the decision-maker’s begins. The same pattern applies for advisers who must constantly remind advisees that these immigration matters are ultimately the advisee’s responsibility and that *they* must decide if and how they will comply. This is easier said than done, especially with language barriers and advisees who completely rely

on the adviser's knowledge of the system and will basically do whatever the adviser recommends.

Advisers on campuses are faced with balancing their counseling and advising responsibilities as university administrators with their governmental reporting obligations. That is not easy when government rules and instructions are not always clear and subject to varying interpretations. Reported information, if entered incorrectly, could cause students trouble at ports of entry to the U.S., delays in getting visas, visa denials, and even arrest and deportation. Institutions must support well-trained, conscientious advisors who are able to handle these complex duties and legal responsibilities. Flexibility and creativity are essential characteristics of a successful and “can-do” adviser, but they also need to be able to draw the necessary lines and communicate those lines clearly to others, especially advisees. Some lines, such as making a misrepresentation to the government (or even hinting that a student advisee should do so), should never be crossed or even approached. As is the case for the foreign nationals, the “unpardonable sin” for DSOs is misrepresentation to the government. Questionable or aggressive advising situations can often have the “sting” taken out of them with full disclosure to the parties involved, including the applicable government agency, to avoid subsequent charges of misrepresentation. Special care should be taken when applications or other official documents are being endorsed or certified – even the routine signing of an I-20 form involves serious and comprehensive representations to the government.<sup>3</sup>

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<sup>3</sup> In signing the Form I-20 at item 10, the designated school official certifies under penalty of perjury, that:

*“All information provided above in items 1 through 8 was completed before I signed this form and is true and correct. I executed this form in the United States after review and evaluation in the United States by me or other officials of this school of the student’s application, transcripts, or other records of courses taken and proof of financial responsibility, which were received at the school prior to the execution of this form; the school has determined that the above-named student’s qualifications meet all standards for admission to the school; the student will be required to pursue a full course of study as defined by 8 C.F.R. 214.2 (f) (6); I am designated official of the above-named school and I am authorized to issue this form.”*

Successful prosecution for perjury would require the government to prove that the school official willfully and knowingly certified to false information with the intent to deceive. Unintentional omissions and misinterpretations do not constitute perjury. U.S. law provides severe penalties for willfully making a false statement to a government official. School officials should be aware of the importance the government attaches to the proper certification and signing of Forms I-20. (2005 Adviser’s Manual 3.25.7.3)

Another facet of the adviser/advisee relationship that sometimes raises ethical dilemmas is the concept of actual vs. constructive knowledge. As they meet with individual students and scholars, advisers often walk a fine line between looking the other way (“I didn’t just hear that”) and cutting off a conversation when a suspicion of status violation is still just a suspicion and has not been confirmed. A carefully worded and well-timed “hypothetical” from the adviser (“If you have worked without authorization then your option is “A,” if not, your option is “B”) often leaves the disclosure and decision up to the student, who ultimately bears this responsibility. This is frequently challenging to do, especially with language barriers and unclear legal standards that are not always easily explained.

### Obscure

9/11 and the current “war on terror” have brought the historically-overlooked profession of international advising out of obscurity and onto center stage. With this increased attention, many institutions have reevaluated not only where this function resides and reports on campus, but whether it is adequately staffed and supported. With all the varied responsibilities of advisers, there are many possible offices on campus where they might reside and report, with as many variations as there are institutions.

Where this function resides at a particular institution may depend on whether international student and international scholar services are combined and where other related functions such as student services, human resources, I-9 processing, tax compliance and other international-related programs like study abroad and ESL are housed. Whatever the institution’s history and regardless of its organization and reporting structure, in today’s security-minded and compliance-driven environment, there should definitely be a close working relationship between the international office and both the legal counsel and the campus safety offices. Most international offices take seriously the responsibility to inform, counsel, and assist their students, scholars and the rest of the campus community in dealing with the many confusing new rules and procedures affecting them. Advisers with no legal background are interpreting immigration laws and regulations, authorizing employment, and performing other quasi-legal functions on a daily basis in their roles as DSOs. Given this dynamic, perhaps

institutions should consider formally connecting international and legal counsel offices and treating international advisers like legal assistants or paralegals.

Regardless of where international offices are housed and what label their advisers wear, to properly perform their multi-faceted duties, advisers need adequate staffing, training, association with professional organizations, professional development opportunities, and ready access to both university legal counsel and experienced immigration attorneys.

Steven B. Kennedy, a former officer at NAFSA, has correctly observed:

With college's and university's free to choose their own level of commitment to the federal student visa programs . . . it is not surprising that practices around the nation diverge widely. Many institutions, including most of those that enroll large numbers of foreign students, invest heavily in the facilities and trained personnel that allow them to make the most of international exchanges. Such institutions typically enable their employees to attend professional meetings, purchase publications, and obtain training. Others invest a moderate amount – often just enough to get by. But an unknown number seriously under invest, providing their DSOs no training or resources. The institutions that spend too little on staffing and administering their international-exchange programs incur entirely predictable results. Their international-student offices (if they have them) are under qualified and overwhelmed. Burnout and turnover are rife. Successive new-comers do their best to cope with waves of students in a sea of unintelligible regulations. (“Where Are the Standards for Foreign Student Advisers” Chronicle of Higher Education, 5/24/02)

Organizations like NAFSA have done much to advance the training, ethics and professionalism of this field, but compliance remains purely voluntary and institution-driven.

Institutions that under-invest in this area will reap their reward in the form of careless or uninformed advising which may lead to adverse and serious consequences for individual students and scholars, to potential liability and negative publicity for the institution and in some situations even the loss of the institution's delegated authority to admit or hire internationals. Unlike the looming, but never-used “atomic bomb” of losing federal funding for patterns and practices of FERPA violations, there is a long list of proprietary schools, English-training institutes and other programs that have voluntarily or involuntarily lost their ability to admit internationals. The increased scrutiny and ongoing publicity in this area, combined with the enforcement-minded and security-

conscious government agencies overseeing these programs, make the withdrawal of international programs, even for regular academic institutions, a realistic consequence that should not be ignored.

Perplexing, difficult to explain or understand

Immigration practice in the United States features a multi-agency system founded on laws and regulations which are glossed over by agency interpretations, political considerations and legal “lore” that often have more impact than the actual law. These secondary influences have always permeated this field and since 9/11 have nearly *preempted* it. This system can be confounding even to seasoned practitioners, while foreign visitors, many of whom are in this country for the first time and experiencing significant cultural and language adjustments, are often left to figure it out on their own. International advisers and their support staff serve as legal guides through this system and provide a cultural buffer and personal support that may well make the difference between a frustrating and a successful experience for many visiting this country.

International advisers must not only understand and interact with several different federal agencies responsible for immigration and homeland security, they are increasingly having to interface with state and local authorities and regulatory efforts as well. Advisers are also often tasked with being the “spokesperson” for these government entities by disseminating updates and other information to their institutions and advisees. Advisers have experienced dramatic changes since 9/11 as they have faced the unprecedented challenge of keeping up with the almost daily onslaught of new regulations, policies, and directives affecting their institutions and advisees. Official information alone has been voluminous and the informal interpretations, commentary, listserv discussions, and conference presentations have increased it exponentially.

The NAFSA Advisor’s Manual has traditionally been the best reference for constantly changing regulations and procedures in this field. There are also issue-specific resources like the SEVIS liaison call summary of NAFSA/agency conference calls and NAFSA practice advisories most of which are available on NAFSA’s website (<http://www.nafsa.org>). NAFSA and its Knowledge Community for International Student and Scholar Services (KCISSS) [formerly the Council of Advisors to Foreign

Students and Scholars (CAFSS)] are outstanding, almost indispensable resources for international advisers. However, NAFSA's industry-wide scope and its self-appointed role as an ever-expanding umbrella organization for "all things international" in academia, sometimes seems to dilute the clear professional guidelines that quasi-legal international advisers need to do their jobs effectively. This guidance and discipline may ultimately have to come from individual institutions and would be a natural outgrowth of closer connections to campus legal and/or compliance offices. International advising in most institutions increasingly requires knowledge of systems administration and a facility with databases and their interface with information and processes both inside and outside the institution. This often presents a challenge for DSOs, many of whom have historically come from counseling or human service backgrounds.

At many institutions the international services office is the only one on campus that deals exclusively with internationals and often become involved in other tangential international issues unrelated to the immigration advising under the F, J or M programs for which they have direct responsibility. I-9, certifications, social security number issues, export controls, travel issues, health care, tech transfer, fundraising -- basically anything that enters or leaves the U.S. (which in this era of globalization basically means everything) -- might find its way to the international office.

International advisers at institutions without designated tax managers or service centers may also find themselves being asked to provide state and federal income tax advice or at least direction for foreign nationals who are justifiably confused and frustrated with a system that borders on sadistic. Non-resident alien tax compliance is definitely an area that is best left to the experts, although, depending on an institution's structure and previous efforts, international advisers may play a key role in achieving complete compliance in this area.<sup>4</sup>

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<sup>4</sup> Appended to this outline (Appendix A) and used by permission of the authors is an overview of nonresident alien tax materials that are treated more fully in Elenor Pelta and Donna Kepley, Immigration and Tax – At the Crossroads: Immigration Issues for Tax and Payroll Professionals, Arctic International LLC (2<sup>nd</sup> Ed. 2004), and Donna Kepley, Nonresident Alien Tax Compliance: A Guide for Institutions Making Payments to Foreign Students, Scholars, Employees, and Other International Visitors, Arctic International LLC (2005 Edition).

Another challenging issue that has been complicated by the new SEVIS rules is what action, if any, an adviser should take when he or she becomes aware of an undocumented alien attending their institution. Unlike the specific legal provisions prohibiting employers from hiring an undocumented alien, there is no such provision prohibiting institutions from letting them attend school. A recent NAFSA practice advisory (2001-D) offers this insight:

“There is generally no restriction on individuals who are maintaining status in other immigration categories [other than F, M or J] from engaging in study that is incidental to their primary purpose in being here (likewise, institutions are under no legal obligation to restrict undocumented or out of status individuals from enrolling in school). Schools are not required by the immigration laws to keep additional information on such students. Although the question of whether or not a university is obligated to report the presence of undocumented or out of status individuals enrolled at the institution is a bit complicated, a review of the law supports the assertion that institutions are not required to report such a presence when the individual is simply attending school.”

While DSOs may have no official connection with or stewardship over students or scholars outside their designated programs, they are often called to advise the institution on related matters and even to advise the undocumented or out-of-status individuals. Most of these situations are extremely complicated, with no simple answers or solutions. Advising these individuals can often be precarious for the individual, for the institution, and for the adviser. Interface with the government may involve bending the rules or stretching previous policies and practices beyond what even the most “can-do” adviser feels (or should feel) comfortable doing. With the complications involved and consequences at stake in many of these situations, it is almost always appropriate to refer these matters to independent immigration counsel.

Despite the perplexity, obscurity and ambiguity that the challenges of recent years have added to an already enigmatic profession, international advisers are in a position to help those they serve, both individuals and institutions, to see the “bigger picture.” With appropriate training, support and campus connections, these professionals will keep their institutions in legal compliance on a complicated battlefield, while at the same time helping to keep their doors open and inviting for the internationals they educate and hire.

## Appendix A

### **How do federal tax issues fit into institutional immigration policy?<sup>5</sup>**

Perhaps the only area college counsel avoid as readily as immigration is taxation - especially for foreign nationals. Few colleges and universities have a Tax Office, a Tax Manager or even a person designed to monitor tax issues that arise at the institution outside of the “standard” tax issues (e.g., payroll tax deposits, year-end wage/payment reporting, or Form 990 filing). The frequency (and now results) of recent IRS audits suggests that many colleges and universities are still not in compliance with the complicated reporting and withholding issues in connection with payments to nonresident aliens. In the current environment, tax issues for foreign students and scholars can have an impact on their immigration situation. Given the interplay between tax and immigration rules affecting foreign nationals, it is important that Offices of General Counsel be familiar with the basic tax rules and their interaction with immigration laws.

While the discussion of general nonresident alien tax compliance far exceeds the scope of this article, following is a brief discussion of some of the issues that arise in connection with the sponsorship and/or hiring of foreign nationals in the college and university environment. First, it is important to know that the rules for withholding tax from and reporting payments to certain foreign nationals differ greatly from those for payments made to U.S. citizens.<sup>6</sup> For U.S. tax purposes, there are four categories of individual payees: U.S. citizens, permanent resident aliens (i.e., “green card” holders), resident aliens for tax purposes, and nonresident aliens for tax purposes. While it is fairly simple to identify U.S. citizens and permanent resident aliens, the manner by which the U.S. tax status is determined for all other individual payees is based on the application of the “substantial presence test.”<sup>7</sup> The substantial presence test basically determines whether a foreign national has been “substantially present” in the United States

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<sup>5</sup> This section is an overview of materials that are treated more fully by the author in Elenor Pelta and Donna Kepley, Immigration and Tax – At the Crossroads: Immigration Issues for Tax and Payroll Professionals, Arctic International LLC (2<sup>nd</sup> Ed. 2004), and Donna Kepley, Nonresident Alien Tax Compliance: A Guide for Institutions Making Payments to Foreign Students, Scholars, Employees, and Other International Visitors, Arctic International LLC (2005 Edition). Also used in the chapter, “Seven things college counsel must know about immigration law” in the American Immigration Lawyers Association publication, *Immigration Options for Academics and Researchers*, available for purchase at <http://www.aialapubs.org/imopforacand.html>

<sup>6</sup> Internal Revenue Code (“IRC”) §1441 and the regulations thereunder set forth the rules for withholding tax from individuals known as “nonresident aliens”.

<sup>7</sup> IRC §7701(b) and Treasury Regulations § 301.7701(b).

and should, therefore, be taxed in the same manner as a U.S. citizen. The test looks at a three calendar year period with decreasing importance placed on past years. A person who comes to work or otherwise live in the United States will generally pass the test once he or she has been present here for at least 183 days (or six months); however, certain exceptions to the test exist primarily for individuals who come to the United States for educational or non-profit purposes.

When an individual has accumulated at least 183 days based on the special calculations of the substantial presence test, he or she is deemed a resident alien for tax purposes. Individuals who come to the United States in an “educational” immigration status (i.e., F, J, M, or Q) are allowed to remain for a longer period as a nonresident alien for tax purposes. In the case of an F, J, M or Q student, five calendar years; in the case of a J or Q non-student, two calendars years every seven-year period. Once an individual has “passed” the substantial presence test, he or she is treated in the same manner for tax purposes as a U.S. citizen.

Next, it is important to understand some of the primary differences between being taxed “like” a U.S. citizen and as a nonresident alien for tax purposes. When a nonresident alien for tax purposes is paid, the entity making the payment (e.g., the college or university) is held responsible and liable for performing the correct tax withholding. If the statutory rate of tax is not deducted at the time of payment, the payor will be held liable for the tax (and penalties for not withholding correctly and interest from the time it was not correctly withheld) in the event of an IRS audit<sup>8</sup>. Contrast that with the fact that a U.S. citizen is responsible for paying his or her own tax – regardless of whether or not the payor correctly withholds tax at the time of payment.

In addition, there are various other key differences between taxation of U.S. citizens and of nonresident aliens:

1. U.S. citizens may choose how they wish tax to be withheld from their payments (or pay the tax at year-end with their tax return); however, nonresident aliens are required to have a statutory rate of tax withheld to ensure that no tax is due at year-end when they file a tax return.
2. Employees who work in the United States are required by law to pay FICA tax<sup>9</sup> (and their employer must make a matching FICA tax contribution); however, individuals who are present in the United States as a (i) nonresident alien, (ii) F, J, M, or Q immigration status, and (iii) working legally as the primary holder of the immigration status (e.g., the “-1”)<sup>10</sup> are exempt from FICA tax.

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<sup>8</sup> IRC §1461.

<sup>9</sup> IRC §3121(b) contains several exceptions to FICA tax withholding, notably IRC § 3121(b)(10) for students who work at a college or university while attending classes.

<sup>10</sup> IRC§ 3121(b)(19).

3. Nonresident aliens who receive non-service scholarship or fellowship payments in excess of tuition and fees/books (e.g., housing, board, travel, living allowance, stipend) are subject to tax withholding at the time of payment, regardless of whether a “cash” payment is made or non-cash credits/waivers are placed on a student’s account. U.S. students and scholars who receive a non-service scholarship or fellowship are not required to pay the applicable tax at the time of payment, rather must self-disclose the income on their tax return and pay any applicable tax at that time.
4. U.S. citizens may not use a tax treaty with another country to avoid paying U.S. tax; however, nonresident aliens for tax purposes may, in many cases, qualify to exempt their income from U.S. taxation.

As a result, the visa classification used to bring a professor or researcher to the United States can affect the individual’s current and future tax status, as well as cost/save the institution money. For example, if a university sponsors an individual as a researcher under a J-1 non-student immigration status, the individual may be exempt from FICA tax;<sup>11</sup> therefore, the university may also be exempt from FICA tax and may save a considerable amount of money. Certain speakers or short-term visitors who enter under a J-1 non-student immigration status may be eligible for certain reductions in taxable income (and thus reduced tax withholding) that a visitor who enters the United States under a B-1 immigration status would not. This distinction can be particularly important where the institution pays the tax on the payment (“grosses up” the payment) made to the speaker.

Practice Pointer - The issue of nonresident alien tax compliance can become complicated quite quickly. Because the institution’s tax liability can be substantial when making payments to foreign nationals who may be nonresident aliens, a comprehensive plan for tax compliance must be in place that focuses on (i) identification of nonresident aliens, (ii) review of tax withholding and reporting issues, (iii) effective communication among departments/programs within a decentralized institution, and (iv) fair and cross-culturally sensitive treatment of the foreign nationals to whom payments will be made.

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<sup>11</sup> Presuming the individual has not been present in the United States for a period long enough to pass the substantial presence test and based on IRC§ 3121(b)(19).